

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 07 June 2005**

CASE NUMBER: 2005-STA-0020

*In the Matter of:*

**PAUL A. MILLER,**  
Complainant,

v.

**BASIC DRILLING COMPANY,**  
Respondent.

**RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT AS UNTIMELY**

This matter arises from a complaint by Paul A. Miller ("the Complainant") under the whistleblower provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (hereinafter "The STAA" or "the Act"). The written complaint, which was submitted to the Department of Labor's Occupational Health and Safety Administration (OSHA) on September 16, 2004, alleges that Basic Drilling Company ("the Respondent") fired the Complainant on September 9 or 10, 2003 for refusing to drive a truck he believed to be unsafe. In a letter dated January 21, 2005, the San Francisco Deputy Regional Administrator for OSHA informed the Complainant that his complaint was being dismissed because he had failed to submit it to OSHA within 180 days from the date of his termination, as required by the provisions of the Act. Thereafter, the Complainant filed a timely appeal with the Office of Administrative Law Judges.

In a Notice issued on March 4, 2005, the undersigned Administrative Law Judge notified the parties that any motion to dismiss this matter based on the Complainant's failure to file his complaint within the 180-day filing period should be submitted no later than April 15, 2005. In addition, May 15, 2005 was set as the deadline for submitting any responses to such a motion.

In a letter dated March 21, 2005 Mark Harambasic, Vice President of the Respondent, asked that the complaint be dismissed as untimely. In addition, the letter confirmed that the Complainant had been fired for refusing to drive a truck, but contended that the truck was not, in fact, unsafe.

Although the Complainant did not file any response to the March 21, 2005 letter from Mr. Harambasic, the Complainant did submit a letter dated March 11, 2005. In that letter, the Complainant asserted that on September 15, 2003 he spoke to Clarence Mason of the Arizona Department of Occupational Safety and Health (ADOSH) for approximately 15 minutes but Mr. Mason failed to get back in touch with the Complainant, as he had promised. The Complainant

further represented that on unspecified dates he contacted the Arizona Department of Transportation (ADOT) and “the regular OSHA number at (800) 356-4674.” In addition, he alleged, he contacted “all of these agencies” on the first Monday of every month during every month beginning in October of 2003, but no one ever returned his calls or contacted him by mail. In August of 2004, according to the Complainant’s letter, someone in the ADOT told him to send his complaint to an OSHA office in San Francisco. In addition, the Complainant reported, he has been in regular contact with a staff member in a Congressman’s office in Mesa, Arizona since October of 2004.

## ANALYSIS

Detailed standards concerning the submission of STAA complaint are set forth at 29 C.F.R. §1978.102. Under this regulation, a complaint does not have to be in any specific form and it is therefore permissible to submit oral complaints. Moreover, even though complainants are encouraged to file their complaints with the OSHA Area Director in the geographic region where an alleged violation occurred, the regulations specify that it is permissible to submit complaints to any OSHA employee. However, these regulations also indicate that complaints filed more than 180 days after an alleged violation will not ordinarily be considered unless there are extraordinary circumstances, such as a violation that is continuing in nature or evidence that an employer has misled an employee concerning the grounds for discharge. The regulations also specifically provide that the “pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period.” 29 C.F.R. §1978.102(d)(3) (emphasis added). The regulations define the term “OSHA” as meaning the Occupational Safety and Health Administration. 29 C.F.R. §1978.101(f).

In this case, the letter submitted by the Complainant suggests that he made a verbal complaint to an employee of the State of Arizona’s Department of Occupational Safety and Health within a few days of being fired and also implies that within 180 days of the alleged violation he also made verbal complaints to employees of the Arizona Department of Transportation and to what the Complainant’s letter describes as “the regular OSHA number at (800) 356-4674.” Because the employees of Arizona’s Department of Occupational Safety and Health (ADOSH) and Department of Transportation (ADOT) are not employees of OSHA, any complaints made to those officials cannot be used to satisfy the 180-day requirement for making STAA complaints. On the other hand, if, as the Complainant asserts, he did in fact make a verbal complaint concerning his alleged retaliatory discharge to a “regular OSHA” telephone center within 180 days after his discharge, the Act’s timeliness requirement would be satisfied. However, it is hereby officially noticed that the “regular OSHA” telephone number given by the Complainant in his letter of March 11, 2005 is not in fact an OSHA number, but is instead the toll-free number for the National Institute for Occupational Safety and Health, which is a research entity better known as “NIOSH.” It is not a law enforcement agency, part of OSHA, or even part of the Department of Labor. Instead, it is part of the Department of Health and Human Services. Hence, the call to NIOSH could not have qualified for purposes of meeting the 180-day filing requirement. Finally, it is noted that the Complainant also contacted a Congressman’s staff about his complaint in October of 2004. However, that contact occurred more than a year

after the alleged STAA violation and therefore could not meet the Act's 180-day filing requirement.

Accordingly, it has been determined that it is necessary to grant the Respondent's request that the complaint in this case be dismissed as untimely. *See Hoff v. Mid-States Express, Inc.*, ARB No. 03-051 (May 27, 2004); *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052 (March 22, 2001).

### **ORDER**

The complaint of Paul A. Miller against Basic Drilling Company is hereby dismissed.

**A**

Paul A. Mapes  
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996)